

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-CV-40014-FDS

SANDRA S. KATZ,)
Defendant In Counterclaim)
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)
MATTHEW DENN, INSURANCE)
COMMISSIONER OF THE STATE OF DELAWARE)
AS RECEIVER OF NATIONAL HERITAGE)
LIFE INSURANCE COMPANY IN LIQUIDATION)
Plaintiff in Counterclaim and Third Party Plaintiff)
)
)
)
)
FEDERAL DEPOSIT INSURANCE CORPORATION,)
UNITED STATES OF AMERICA, E. PERRY KING,)
ALAN MASON, ALAN MASON LEGAL)
SERVICES, P.C., ALAN MASON LEGAL SERVICES,)
INC., ALAN MASON D/B/A ALAN MASON LEGAL)
SERVICES, P.C., ALAN MASON D/B/A ALAN)
MASON LEGAL SERVICES, INC., AND ALAN)
MASON LEGAL SERVICES, P.C. D/B/A ALAN)
MASON LEGAL SERVICES, INC.,)
Third Party Defendants.)
)
)
)
E. PERRY KING AND MANSOUR GAVAL,)
Fourth Party Defendants.)

**MATTHEW DENN'S, INSURANCE COMMISSIONER OF THE STATE OF
DELAWARE, MOTION TO SUBSTITUTE DEFENDANT IN COUNTERCLAIM**

Now comes the Defendant Matthew Denn, Insurance Commissioner of the State of Delaware, as Receiver of National Heritage Life Insurance Company in Liquidation ("NHL"), and respectfully requests this Honorable Court to order that Fatu Miller ("Miller"), the current owner of 19 Canton Street, Worcester, Massachusetts, ("Canton property") be made a party to this action pursuant to Fed.R.Civ.P. 25(c).

Fed.R.Civ.P. 25(c) permits a substitution of parties when there is a transfer of interest:

In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

See Fed.R.Civ.P. 25(c).

Rule 25(c) "does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor is not named." 7C Wright, Miller & Kane, *Federal Practice & Procedure*, Civ.2nd, §1958. See also *Blachy v. Butcher*, 221 F.3d 896, 911 (6th Cir. 2000).

Furthermore, Rule 25(c) is considered a continuation of Federal Rule of Civil Procedure 17, which requires that "every action shall be prosecuted in the name of the real party in interest". The analysis distinguishing the two rules is that Rule 17 controls "where a transfer of interest such as by an assignment takes place prior to the commencement of the action", whereas Rule 25(c) applies when a transfer of interest has occurred during the pendency of an action. *Explosives Corp. of America v. Garlam Enterprises Corp.*, 817 F.2d 894, 907 (1st Cir. 1987). In other words, Rule 25(c) "applies only to transfers that occur after the filing of an action." *Metlife Capital Corp. v. Water Quality Insurance Syndicate*, 198 F.Supp.2d 97, 103 (D. Puerto Rico, 2002).

Since Sandra S. Katz, the original plaintiff and defendant in counterclaim to this action, during the pendency of this action transferred her interest to Miller through a deed, Miller should be substituted as a defendant in counterclaim. See *Blachy v. Butcher*, 221 F.3d 896, 911 (6th Cir. 2000).

NHL also relies upon the facts and law outlined in its Memorandum of Law submitted in support hereof.

Respectfully submitted,
Matthew Denn,
Insurance Commissioner of
the State of Delaware As
Receiver of National Heritage
Life Insurance Company in

By his attorneys,

/s/ James F. Creed, Jr.

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Dated: April 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true copy of the within document to be served in accordance with L.R. 5.4(c):

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/s/ James F. Creed, Jr.

James F. Creed Jr.

Dated: April 26, 2007

LOCAL RULE 7.1 CONFERENCE

I hereby certify that on April 25 & 26 2007, I conferred with counsel in an effort in good faith to resolve or narrow the issues presented therein.

/s/ Sara D. Trupe Cloherty

Sara D. Trupe Cloherty

Dated: April 26, 2007